Pendakwa Raya v Pretum Singh a/l Lal Singh

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 42–34 OF 2003
KAMALANATHAN RATNAM J
16 JUNE 2004

Criminal Law — Penal Code (Malaysia) — s 376 — Rape — Incest — Facts and circumstances considered

Evidence — Corroboration — Rape — Whether conviction based on independent corroboration — Whether secure

The accused (respondent) was charged on an amended charge for the alleged offence under s 376 of the Penal Code of raping his 14 year old daughter, P, since she was 9. The sessions judge acquitted and discharged the respondent on the basis that there was no independent corroboration and the medical evidence was inconclusive to support a rape charge. The prosecution appealed to this court against that decision.

Held, setting aside the acquittal order and finding the respondent guilty:

(1) There was penetration and P's evidence was never challenged. Whilst it is accepted that the burden is always upon the prosecution, a court must not merely reject a prosecution for rape on the basis that there was no independent corroboration. Victims of rape also need justice. That is why once their evidence is accepted and the defence is called upon to explain. A mere denial of the rape is insufficient (see para 21).

(2) The sessions judge had failed to appreciate that P had told her story many years after the rape had commenced because she was frightened for herself and her family. There was also failure in considering J's (her sister) evidence that she too had been raped by the respondent (see paras 24 and 25).

(3) Having considered the respondent's cruel incestuous conduct towards his daughter and the stigma P's got to live with, the respondent is sentenced to the maximum 20 years in prison and ordered 15 strokes of the rotan (see para 27).

[Bahasa Malaysia summary

Tertuduh (responden) disabitkan dengan tuduhan yang dipinda untuk kesalahan di bawah s 376 Kanun Keseksaan merogol anak perempuannya, P, yang berumur 14 tahun semenjak P berumur 9 tahun. Hakim sesyen telah membebaskan dan melepaskan responden atas alasan tidak terdapat sokongan tak bersandar dan keterangan perubatan tidak sempurna untuk menyokong tuduhan rogol tersebut. Pihak pendakwa telah merayu ke mahkamah ini terhadap keputusan tersebut.

Diputuskan, mengetepikan perintah pembebasan dan mendapati responden bersalah:

(1) Terdapat kemasukan dan keterangan P tidak dicabar. Manakala ia diterima bahawa beban selalunya terletak pada pihak pendakwa, mahkamah tidak harus menolak pendakwaan untuk rogol hanya kerana tidak terdapat sokongan tak bersandar. Mangsa-mangsa rogol juga perlu keadilan. Oleh sebab itulah, keterangan mereka diterima dan pihak pembela dikehendaki untuk memberi penjelasan. Hanya memberikan penafian semata-mata tidak mencukupi (lihat perenggan 21).

(2) Hakim sesyen gagal mengambil kira bahawa P telah memberitahu akan nasibnya beberapa tahun selepas kejadian rogol bermula kerana dia risau akan keselamatan keluarganya dan juga dirinya-sendiri. Juga terdapat kegagalan untuk mempertimbangkan keterangan J (kakak kepada P) bahawa dia juga telah dirogol oleh responden (lihat perenggan 24 dan 25).

(3) Setelah mempertimbangkan perbuatan responden yang kejam dan sumbang muhrim terhadap anaknya dan stigma kehidupan yang terlekat pada P, responden dihukum penjara maksimum selama 20 tahun dan diperintah diberi sebatan rotan 15 kali (lihat perenggan 27).

Notes

For cases on s 376 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1591–1613
For cases on rape, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 925–936
For rape, see 11 *Halsbury's Laws of Malaysia* para [190.380]
For corroboration, see 12 *Halsbury's Laws of Malaysia* paras [210.148]–[210.149]

Legislation referred to

Penal Code s 376
Evidence Act 1950 s 114(g)

Azman Bin Abu Hassan DPP for the appellant
Jagjit Singh (Ahmad Badri Othman with him) (JJ Singh and Associates) for the respondent

Kamalanathan Ratnam J:

THE AMENDED CHARGE

[1] The amended charge against the accused read as follows:-

> Bahawa kamu antara tahun 1995 hingga bulan April tahun 1998, di rumah No 118, Jalan Kedidi, Taman Sepadan, Nibong Tebal, di dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang, telah melakukan rogol terhadap anak perempuan kamu nama P, oleh yang demikian itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan.

[2] After hearing the evidence of the defence the Learned sessions judge acquitted and discharged the accused. Dissatisfied with that decision the Public Prosecutor appealed to this Court.

FINDINGS OF THE COURT

[3] The story unfolded this way. On 9 June 1998 at about 11.20am one P who was 14 years old lodged a police report that her father had been raping her from the time she was 9 years old until April 1998. She even alleged that the father had also at the same time raped her elder sister too.

[4] One Kurdip Kaur, the aunt of both P and her elder sister J testified that on 7 June 1998 when they were all gathered at her mother's place including her sister (the mother of both the girls) J told her that both she and her younger sister P had been continuously raped by the accused. The girls were frightened to report this any earlier as the accused had threatened to kill them and their mother if the girls complained about the rape to anybody. After discussion, they then decided to lodge a police report.

[5] J informed the court that the accused telephoned her at her place of work in Kuala Lumpur and ordered her to return. He threatened her that if she did not return P would suffer. He threatened that he would do to P what he did to her. She therefore returned with the intention of checking with P if she too had been raped.

[6] On reaching Butterworth she talked to P and asked her if she knew that the accused had raped her that is, J. P told her that she had seen the accused raping her. P then admitted that she too had been raped by the accused. P then told her that possibly another younger sister might also know of this. However J did not see P being raped. When she asked P why the latter had not informed her of the rape, P told heir that the accused threatened to kill their mother and her sisters and so she was frightened to report the rape. The accused used to rape her when her mother went to the temple or for weddings or when she went to the factory to help her aunt in her business or when her mother visited P' s grandmother. This happened more often when their mother stayed overnight and when the accused refused to allow the girls to stay overnight with the mother.

[7] She informed the court that the accused did not give enough money for the support of the family since he used his salary to drink alcohol. There were frequent quarrels between the accused and her mother over this. At times the accused even assaulted her mother.

[8] In 1989 she was raped three times a week. She however did not inform her mother as she was afraid. It is important to note that in his cross-examination of J, the defence only questioned her as to why she failed to inform her mother or sisters or even the accused's family who had moved close to her house, or why she had not informed any of her school friends and to which her one and only answer was that she was afraid of the Respondent. Counsel never put it to her that her story was untrue and that neither she nor P was raped by the accused. Further P said she saw the respondent raping

J and this evidence was not challenged in that when P gave evidence she was never questioned on this. This evidence therefore remained unchallenged and it would become important later when pitting P's evidence as against the accused's denial of the rape.

[9] The mother testified that between 1993 to 1998 she used to go marketing, to the temple and for family gatherings once a month and that she also visited relatives and that she used to stay overnight. The accused did not accompany her on those visits. He stayed at home with her five children, the eldest of whom is J. Under cross-examination she said that if there was a wedding on her side of the family, the respondent would refuse to attend that wedding. She also confirmed that when she had to be away for family funerals and when she had to stay overnight, the accused suddenly took leave at the last minute to be at home. This she found out later. Again it was not put to this witness that the respondent did not rape both the girls.

[10] It was P's turn to testify. She was 14 years old when she gave evidence. She confirmed that J returned from Kuala Lumpur and told her the reason she had come back. It was to question her if she had been raped as J had been. This was when all of them had gathered at her grandmother's house after a wedding on 7 June 1998. Initially she refused to answer as she was frightened. When J persisted she began to cry. J then comforted her and assured her that she would not be going back to the father's place at Nibong Tebal and that therefore she need not be frightened. She then related her nightmare. She maintained that she was frightened to speak out because the respondent had threatened to kill her, J or their mother if she did so. She was also told that she would be chased out of the house.

[11] She and J then entered the house and then she related the whole story to her aunt Kurdip Kaur. She narrated how the respondent raped her and J. She confirmed being raped for the first time in 1993 and then continuously till April 1998, in the house in Nibong Tebal for two to three times a week. There would be no one at home whenever she was raped as her mother would have either gone to the market or attended a wedding or had gone to work. The youngest two children would be at home but they never saw the rape. Whenever the rape took place she tried to avoid her father but he would hold her legs or hand or close her mouth. He had often used a kitchen knife to threaten her into silence and she was always frightened.

[12] When she gave evidence in camera she related in graphic detail how the rape occurred. In 1993 for the first time he merely placed his penis on her and ejaculated. She was first raped when she was in Standard Five or Six. She could feel the penetration and she also felt the pain. Each time he raped her, he was in her for five to ten minutes. Between the years mentioned earlier, she never had a boyfriend nor had she masturbated.

[13] When cross-examined as to why in her police report she had said that she was first raped in 1993 she said that at that time she did not know the difference between penetration and placing the penis on the private part of her body. She thought that that act constituted rape. The actual penetration actually occurred when she was in Standard Five or Six. Again what is of

significance is that throughout the entire cross-examination it was never put to P that she was never raped and that the allegations that the respondent had raped her continuously up till 1998 were not true.

[14] The doctor who initially saw P on 9 June 1998, the gynaecologist who saw her the next day, both confirmed that there were hymental tears at positions 2 and 7 o'clock and that they were old tears. Under cross-examination the doctor who initially examined her confirmed that such tears could be caused by masturbation. The prosecution at this stage tendered the amended charge to read 1995 instead of 1993. The birth certificate of P tendered as an exhibit showed she was born on 11 December 1984 which meant that she was below 16 years old and that therefore it became statutory rape whether she gave her consent or not.

FINDINGS OF THIS COURT

[15] Having heard all the evidence and the submissions of both parties and after adjourning the matter the learned sessions judge held that the prosecution had made out a *prima facie* case by establishing all the ingredients relevant to s 376 of the Penal Code, against the respondent, and called upon him to enter into his defence.

[16] Soon thereafter the learned sessions judge was transferred and the case was continued before another sessions judge. The respondent testified to the effect that in 1995 he was a bus driver attached to Syarikat Red Omnibus in Parit Buntar and that he left for work each day at 6am and returned at 9pm to 10pm. Usually he worked six days a week and at times he had even worked seven days a week. Usually he was off every Tuesdays. He testified that in 1995 his family regularly quarrelled because of his low income. Although he is still married to his wife, they are living apart since 1998. In 1995 his relationship with P was normal, like that of father and daughter. He was unable to explain why P would make such serious allegations against him. He denied raping her at all and contended that he worked even on Saturdays and Sundays. Whenever his wife went for weddings, funerals and for prayers the eldest namely J would mind the young girls. From 1995 to April 1998 he denied being alone with P. The possible reason both the girls accused him of rape was because he quarrelled with his wife as both the girls were close to his wife.

[17] Under cross-examination he maintained he had a good relationship as father and daughter between himself and P and yet he did not know why she had made such serious and false allegations against him. One possibility was that because he had frequent fights with his wife, his wife could have taught her to make such allegations. Unfortunately this was never put to the mother. It is trite law that a defendant ought to put his case to the prosecution's witness at the earliest opportune moment. Failing to do so, and then subsequently adducing such evidence through himself without earlier challenge as to its veracity, will not carry much, if not any weight, that is to be given to that piece of evidence. Another issue of contention was the respondent's evidence that he could not have entered P's room to have raped her because it was

locked from the inside. Again this very important piece of evidence was never put to the mother or to P or to J. The respondent called his son D as his witness. D supported the respondent's evidence throughout. He testified that the respondent worked from 6am to 9pm or 10pm and would have had no opportunity to rape P. He did not believe the allegations since P behaved normally and the relationship between the respondent and P was normal. Besides he slept with the respondent and he would have known if anything had happened.

[18] Under cross-examination he denied the suggestion that he would not know what went on if he was asleep. Finally he agreed that if he did not see nor hear anything he would not know if anything went on in the house whilst he slept. The last witness called by the respondent was his sister who testified that even though she was very close to P, P had never complained to her at all about the respondent's conduct. Under cross-examination she maintained that even though she lived in Gopeng she would know what went on at the respondent's house.

[19] Counsel submitted that the evidence of the complainant P was nothing but pure fabrication. He was unable to say who taught her to fabricate the story. In other words there is clear abandonment even of the far-fetched suggestion of the respondent in cross-examination that P could have fabricated it at the instigation of the respondent's wife with whom he had frequent quarrels.

[20] As I had said, to my mind, even this suggestion is far fetched. Why would a mother spoil the entire future of her young daughter by making such a drastic and serious allegation, knowing full-well that by making such an allegation she would have shut the door to the marital future of her daughter within the Sikh community, which is well known for its disciplined life.

[21] Having analysed the submissions of counsel before me I was satisfied that there was penetration. There was no reason to reject P's evidence. In fact she was never challenged on this. It was never put to her that she was never raped. Although the learned DPP had touched on this aspect in his submission, unfortunately the lower court failed to appreciate the significance of this submission. The respondent satisfied his lust by raping P three to four times a week. The doctor confirmed that there was penetration. Although defence had suggested that this could be caused by masturbation or by insertion of fingers into the vagina, P had denied that she had ever done that. Why should her evidence on this not be believed. For that matter why should her entire evidence be not believed at all. To my mind once a court accepts the evidence of the complainant on a rape charge coupled with medical evidence of penetration and calls for the defence, the court must scrutinise the evidence of the defendant carefully. Whilst it is accepted that the burden is always upon the prosecution, a court must not merely reject a prosecution for rape on the basis that there was no independent corroboration. It is time to look, seriously into this field of crime. Victims of rape also need justice. That is why once their evidence is accepted and the defence is called

upon to explain, a mere denial of the rape is insufficient. This respondent testified that his supervisor, Ram, would know if ever he left for home during working hours since he was expected to be at work from 6am to about 9pm–10pm. It would have been easy for the respondent to have called Ram, the station master, to say that he was always at work and that he could not have had the opportunity to have committed the rape. In any case he had an off day, namely, every Tuesday.

[22] The learned sessions judge acquitted the respondent on the basis that the medical evidence whilst showing tears in the vagina at two places, was inconclusive to support a charge for rape because the doctors also testified that such tears could have been caused by masturbation. Therefore, he held that since there was no independent corroboration it was unsafe to convict. But it was obvious that in rejecting the evidence of P that she was raped, he had taken into consideration the fact that she had only informed of the rape in 1998 whilst at her grandmother's house where her mother was also living because when her sister J persuaded her to tell the truth as to what had happened to her, J had assured her that she, ie P, need not be frightened as she would no longer be going back to Nibong Tebal, ie the matrimonial home of the parents. From this the learned sessions judge inferred that the mother was no longer living with the father and that therefore there was no reason for her not to have told her mother much earlier of this incident. In drawing this conclusion the learned sessions judge had failed to consider or even give due weight to the threat by the respondent that if she was to disclose the fact of him having raped her, he would kill her or the mother or even J. If the learned sessions judge had considered this threat and having balanced this threat against his earlier inference and had given considered reasons, this court would not have interfered with his judgment. Further he also held that only when J having come to the grandmother's home in 1998 from Kuala Lumpur and having persuaded P to narrate the story, that P had confirmed the rape.

[23] The learned sessions judge again failed to consider and give due weight to the evidence of J as to why she rushed down to Butterworth to the grandmother's house on the evening of 7 June 1998. She rushed down because the respondent had rung her up in Kuala Lumpur and had ordered her to leave her job in Kuala Lumpur and return to Penang obviously to his house. Since her evidence that she was also raped by the respondent remained unchallenged and since it was never put to her that she was not raped by the Respondent, this court is left to wonder why he insisted on her returning to Butterworth since he had given no reason for wanting her back. He could have said for example that he loved her so much so that he missed her presence, or as a concerned father he feared for her safety in staying alone in Kuala Lumpur. But none of these were his concern. He threatened her that if she did not return immediately he would do to her younger sister P what he had done to her. J testified that as soon as she heard this she rushed up to Butterworth. The learned sessions judge failed to appreciate the concern of J in that she did not want the respondent to do to P what the respondent had done to her and she wanted to check with P if she too had been raped.

If the Learned sessions judge had looked at J's visit to Butterworth in this light he certainly would not have arrived at the conclusion that he did.

[24] The learned sessions judge rejected P's evidence on the basis that she had told her story to all the witnesses, too late. As I had said, the learned sessions judge failed to consider why the report to the police itself was made so late. She was frightened of the threat by the father of physical harm to her and to her mother and to her elder sister, J.

[25] One other factor that seems to have weighed heavily in the mind of the learned sessions judge was that there was another younger sister of P sleeping in the same room, when the rape had taken place. On this account P had told J that there might be a possibility that this younger sister might have seen the rape. This bit of evidence was narrated by J when she testified. The learned sessions judge, held it against the prosecution for not calling the younger sister to testify. Firstly if P was only in Standard 6 at the time she was raped, the younger sister must have been below P's age. Unfortunately no evidence was led as to the ages of the younger children at the material time. Besides P did not say that the younger sister had, actually seen the rape. She said she might have seen it. For that matter the brother who was also sleeping in that room was called by the respondent to testify on his behalf. Although he would have been asleep he told the court that he would know what went on. The room was in darkness and there was evidence to this. How on earth the brother could have seen if the respondent was raping P, was not explained. Since the younger sister was not called nor offered, the court invoked s 114(g) of the Evidence Act 1950 against the prosecution. What the learned sessions judge failed to consider was the fact that since both' the younger daughter and the brother were sleeping in the same room and if the respondent could call the brother to testify why did he not call the younger daughter to also testify. To my mind the application of s 114 (g) could be equally invoiced against the respondent. However I find that the non-calling of the younger sister cannot be an issue because if this younger sister had indeed seen the rape, surely she would have told her mother about it because it would be something unnatural for her to have seen her father lying on top of her naked sister in bed.

[26] During the appeal I asked counsel for the respondent if there was any finding by the Learned sessions judge that he had found the evidence of P as being discredited because of (a) giving conflicting evidence or (b) loss of memory or loss of recall. Mr Jagjit replied by saying that the learned sessions judge did not say that he did not accept P's evidence. However what the learned sessions judge did was that he took into consideration the age of the complainant and looked at the evidence in totality and then decided that independent corroboration was needed and then went about looking for corroborative evidence. Having heard the submissions of both counsel and having read the entire record of appeal and the judgment of the lower court and having warned myself that an appellate court should be loathe to set aside the findings of a trial judge, I have come to the conclusion that the Learned sessions judge had erred in failing to consider the issues I had set out and enumerated in this judgment. I therefore set aside the order of acquittal and found the respondent guilty as charged.

[27] In mitigation counsel pleaded that the respondent was 49 years and 7 months old and worked as a bus driver. He has been separated from his wife and his son now 22 years old, lived with him. It was contended that the respondent was a diabetic, suffered from kidney disease and was being attended to at the Taiping Hospital for the said ailments including high blood pressure. Counsel prayed for a lenient sentence. On the other hand the learned DPP pressed for a deterrent sentence pointing out that this was a case of incest.

[28] In passing sentence I considered the effect of the accused's conduct on his young daughter. She would have to live with the stigma of such a cruel act by a father who was both duty and morally bound to have protected her. She would have to live with the trauma of having been raped by her own father, for the rest of her life. The respondent's lust knew no limits. He threatened and cowed a little girl into submission to satiate his unnatural urge. Even in the animal kingdom the young are protected by the parents. Since I found no satisfactory mitigating factors I sentenced the respondent to the maximum 20 years in prison and ordered that he receive 15 strokes of the rotan. I refused the request for a stay of execution of the sentence but granted a stay of execution of the strokes pending hearing of this appeal.

Stay of execution of sentence refused. Stay of execution of strokes of rotan granted pending appeal.

Reported by Ushah Kanapathipillai